IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11372 of 2001

with

SPECIAL CIVIL APPLICATION No 5859 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KAUSHIK KANTILAL TRIVEDI

Versus

SECRETARY GUJARAT PUBLIC SERVICE COMMISSION

Appearance:

1. Special Civil Application No. 11372 of 2001
   MR BA VAISHNAV for MR KV GADHIA for Petitioners No. 1-2
   MR NJ SHAH for MR DN PATEL for Respondent No. 1
2. Special Civil Application No. 5859 of 2001
   PARTY-IN-PERSON for Petitioner No. 1
   MR NJ SHAH for MR DN PATEL for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 24/01/2002

ORAL JUDGEMENT

#. Both the matters are taken up for final hearing today and are being disposed of by this common judgment.

#. Whether an advocate practising in the District Court or even in the Labour or Industrial Court is eligible to be appointed to the post of Member, Industrial Court and whether such an advocate can be described as "an advocate of the High Court" is the question which is required to be decided in the present petitions.

#. So far as special civil application No.5859 of 2001 is concerned, the same is filed by Mr.Mansuri, who appears as party-in-person, and so far as special civil application No.11372 of 2001 is concerned, the same is filed by two petitioners, namely, Mr.K.K.Trivedi and Mr.A.R.Trivedi. All the aforesaid petitioners are practising advocates. It is not in dispute that they are enrolled as the advocates by the State Bar Council. It is also not in dispute that each of the aforesaid petitioners is on the State Roll of the Bar Council since last more than 10 years. So far as the petitioner of special civil application No.5859 of 2001 is concerned, as per the averments made in the petition, he is a practising lawyer since July 1988 and the certificate of enrollment is annexed with the petition at Annexure-A. The said certificate is granted by the Bar Council of Gujarat and accordingly he is on the roll of the State Bar Council. So far as petitioner no.1 of special civil application No.11372 of 2001 is concerned, he is enrolled as an advocate on 14.7.1983 and the certificate to that effect issued by the Bar Council of Gujarat is annexed with the petition as Annexure-D and as per the same, he is practising since 14.7.1983. So far as petitioner No.2 of the said petition is concerned, he is also enrolled as an advocate on the roll of the State Bar Council and the certificate to that effect is also annexed with the petition. Accordingly, all the aforesaid petitioners are practising advocates since more than 10 years.

#. On behalf of the Gujarat Public Service Commission, a public advertisement was issued on 16.12.2000, inviting applications for appointment to the post of Member, Industrial Court. The said advertisement is annexed at Annexure-B in the first petition. The said advertisement is common and each of the petitioners has applied for the said post in response to the said advertisement.

#. So far as the petitioner of special civil application No.5859 of 2001 is concerned, he was informed by the Deputy Secretary of the GPSC, by letter dated 9.7.2001, that he is not selected by the Commission for interview on account of the fact that he is not possessing the prescribed experience. So far as petitioners of special civil application no.11372 of 2001 are concerned, they were also given similar type of reply, by communication dated 9.7.2001, wherein it is stated that they are not possessing the prescribed experience. The petitioners of special civil application No.11372 of 2001 thereafter, made representations for reconsidering their case by pointing out that they are practising advocates since 1983 and that one of them was, in fact, selected and was kept in the wait list in the past. However, by order dated 14.8.2001, the petitioners were informed that since they are not having requisite experience as practising advocates in the High Court since last 10 years, their prayer cannot be accepted. The said communications are annexed with the petition at page nos. 11 and 12.

#. Both the aforesaid petitions are filed, challenging the aforesaid decision of the GPSC. The GPSC is of the opinion that the petitioners do not have any experience of practising as advocates in the High Court, and on that ground, they were not eligible for consideration. At the time of admitting these petitions, interim orders were also passed by this court, by which the GPSC is directed to process the application of the concerned petitioners on merits and not to reject the same on the ground that the petitioners are not practising in the High Court itself.

#. As stated earlier, it is not in dispute that the present petitioners are practising advocates since last 10 years in the State. The enrolment certificates issued by the State Bar Council are annexed with the petitions. However, the stand taken by the GPSC is that since the petitioners do not possess necessary qualification and since they are practising in the courts subordinate to the High Court, they are not eligible for appointment to the post in question. The question, which requires consideration is whether an advocate, who is practising in the court subordinate to the High Court, can be said to be an "advocate of the High Court".

#. Mr.Vaishnav, learned advocate appearing in special civil application No.11372 of 2001, submitted that, since the petitioners are enrolled as advocates in the Gujarat State, they are entitled to apply for the post in question. He further submitted that, any advocate, who

is on the State roll of the Bar Council, can be treated as an "advocate practising in the High Court". He also submitted that, even the petitioners can be subjected to the disciplinary proceedings by the State Bar Council, and therefore, for all practical purposes, they should be treated as advocates of the High Court itself. He also submitted that, it is not necessary that the petitioners are required to argue their cases before the High Court every day. According to his submission, therefore, decision of the GPSC is dehors the provisions of the law and the same, according to him, is required to be struck down. He also relied on the decision of the Apex Court in the case of Prof.Chandra Prakash Agarwal Vs. Chaturbhuj Das Parikh, reported in AIR 1970 SC 1061 as well as the decision of the Calcutta High court in the case of Subir Chowdhury Vs. Union of India, reported in AIR 1984 Calcutta. 7.

#. Mr.Shah, learned advocate for the GPSC, on the other-hand submitted that, in view of the provision contained in section 10(4) of the Bombay Industrial Relations Act, 1946, the petitioners are not qualified for such appointment. Reference is required to be made to the said provision at this stage. Section 10 provides as under :

"10 (1) The State Government shall constitute a Court of Industrial Arbitration.

(2) The Industrial Court shall consist of three or more members, one of whom shall be its President.

(3) Every member of the Industrial Court shall be a person (who is not connected with the industrial dispute referred to such court or with any industry directly affected by such dispute;

Provided that no person shall be deemed to be connected with the industrial dispute or with the industry by reason only of the fact that he is a share-holder of an incorporated company which is connected with, or likely to be affected by such industrial dispute; but in such a case, he shall disclose to the State Government the nature and extent of the shares held by him in such company.)

(4) Every member of the Industrial Court shall be a person who is or has been a judge of a High Court or is eligible for being appointed a judge

of such court (or has presided over a Labour Court for not less than ten years):

Provided that one member may be a person not so eligible if in the opinion of the State Government he possesses expert knowledge of industrial matters;

(Provided further that a member, who before his appointment as such member has presided over a Labour Court for not less then ten years shall notwithstanding anything contained in section 92, be eligible for appointment on a Bench of the Industrial Court consisting only of one member and section 92 shall have effect accordingly).

##. On behalf of the GPSC, it is submitted that, since the petitioners are not eligible for being appointed as a Judge of a High Court, they are not eligible for appointment to the post in question as per sub-section (4) of section 10. Therefore, since the petitioners are not practising in the High Court itself and since they are practising in the courts subordinate to the High Court, i.e. District Court or Labour/Industrial Court, they are not eligible for being appointed as a Judge of a High Court, and therefore, rightly they were not considered as candidates eligible for appointment to the post in question. At this stage, reference is required to be made to the provision of Article 217(2)(b) of the Constitution of India. The same provides as under :

"A person shall not be qualified for appointment as a Judge of a High Court unless he is citizen of India and has for at least ten years been an advocate of a High Court or of two or more such courts in succession."

On the basis of the aforesaid provision, it is argued by Mr.Shah, who is appearing for Mr.D.N.Patel, that since the petitioners are not practising actually in the High Court and since they are practising in the courts subordinate to the High Court, they are not eligible for being appointed as a Judge of a High Court and accordingly, they are disqualified from consideration for appointment to the post in question.

##. I have heard the learned advocates of both the sides in detail. In my view, the stand taken by the GPSC is not tenable at all. It is required to be mentioned that, so far as the Advocates Act, 1961 is concerned, it defines "advocate" as under :

"Advocate" means an advocate entered in any roll under the provisions of this Act."

Section 2(g) defines the term "High Court" as under :

"High Court", except in sub-section (1) (and sub-section (1-A)) of section 34 and in sections 42 and 43 does not include a court of the Judicial Commissioner, and, in relation to a State Bar Council, means, -

(i) in the case of a Bar Council constituted for a State or for a State and one or more Union Territories, the High Court for the State;

(ii) in the case of the Bar Council constituted for Delhi, (the High Court of Delhi)."

The term "Legal Practitioner" means an advocate (or vakil) of any High Court, a pleader, mukhtar or revenue agent.

Section 16 of the Advocates Act, 1961 deals with the provision of senior and other advocates. Section 16 reads as under :

"(1) There shall be two classes of advocates, namely, senior advocates and other advocates.

(2) An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability, (standing at the Bar or special knowledge or experience in law) he is deserving of such distinction.

(3) Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interests of the legal profession, prescribe.

(4) An advocate of the Supreme Court who was a senior advocate of that Court immediately before the appointed day shall, for the purpose of this section, be deemed to be a senior advocate :

(Provided that where any such senior advocate

makes an application before the 31st December, 1965, to the Bar Council maintaining the roll in which his name has been entered that he does not desire to continue as a senior advocate, the Bar Council may grant the application and the roll shall be altered accordingly.)"

##. It is required to be noted that, so far as the Advocates Act is concerned, there is no distinction between the advocates who are actually practising in the High Court and the advocates who are practising in the courts subordinate to the High Court i.e. District courts etc. Even no separate rolls are prepared for those advocates who are practising in the High Court or in the courts subordinate to the High Court. Advocates Act, 1961 provides for only one distinction, i.e. senior advocates and other advocates. Therefore, in my view, any advocate, who is enrolled as an advocate under the provisions of the Advocates Act, can be described as an "advocate of the High Court" irrespective of the fact whether he is actually practising in the High Court itself or in any other court subordinate to the High Court of the same State. An advocate might be residing at a particular place or might be practising in some other court subordinate to the High Court, still he is eligible to appear before the High Court. So far as the petitioner of special civil application no.5859 of 2001 is concerned, he has submitted that, at least 3 to 4 days a week, he is actually arguing cases in the High Court and for a day or two, he is arguing his cases before the Industrial Court. It, therefore, cannot be said that the petitioners are not qualified for consideration in view of section 10(4) of the Bombay Industrial Relation Act. In my view, it is not necessary for the petitioners to attend the High Court every day to be termed as an "advocate of the High Court". It is even permissible for the advocate to attend any other court in the State for the purpose of arguing his case and there is no restriction that the petitioners cannot appear and argue their cases by filing the vakilatnama in the High Court. It is, therefore, not possible to accept the say of the GPSC that since the petitioners are not actually practising in the High Court itself, they are not eligible for consideration for appointment to the post in question. Since all the petitioners are enrolled since more than 10 years with the State Bar Council, they can be described as "advocates of the High Court" itself irrespective of the fact whether they are actually arguing their case before the High Court every day. In my view, the stand taken by the GPSC cannot be upheld. As stated earlier, any advocate in the State can practise

in the High Court as well and the Advocates Act, 1961 does not describe the High Court Advocates separately. In my view, no distinction can be made out between an advocate who is actually practising in the High Court and an advocate who is practising regularly in the subordinate courts in the same State.

##. Since all the petitioners are enrolled as advocates with the State Bar Council and since their names appeared on the State roll maintained by the Bar Council of Gujarat, as per the provisions of section 17 of the Advocates Act, 1961 they are eligible to be appointed as Member of the Industrial Court. At this stage, reference is also required to be made to the decision of the Apex Court in the case of Prof.Chandra Prakash Agarwal Vs. Chaturbhuj Das Parikh, reported in AIR 1970 SC 1061. The Apex Court in paragraphs 5 and 6 observed as under :

> "One broad point against the interpretation sought by counsel for the appellant would be that the expression "an advocate of a High Court" in its ordinary plain meaning must mean a person who has by enrolling himself under the relevant provisions of law become an advocate of a High Court. If it was intended that the qualification under Article 217 (2) (b) should be that a person appointed to the office of a Judge of a High Court should have practised in a High Court and that practising in a Court or Courts Subordinate to it would not answer the qualification, the language used in sub-clause (b) of Article 217 (2) would have been as follows :
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> "A person shall not be qualified for appointment as a Judge of a High Court unless he has for at least ten years practised as an advocate in a High Court or in two or more such Courts in succession".
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> Apart from this aspect, some of the earlier statutes bearing on the same subject have also used the very same or similar expression. The Legal Practitioners Act, 1879 defined by Section 8 a "legal practitioner" as meaning an Advocate, Vakil or Attorney of any High Court, a Pleader, Mukhtar or Revenue-agent. Section 4 of that Act provided :
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> "Every person now or hereafter entered as an Advocate or Vakil on the roll of any High Court under the Letters Patent constituting such Court,

or under Section 41 of this Act, or enrolled as a pleader in the Chief Court of the Punjab under Section 8 of this Act, shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered - and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in the territories to which this Act extends other than a High court on whose roll he is not entered, or, with the permission of the Court ..... in any High Court on whose roll he is not entered ...."

Section 41 of the Act empowered a High Court to make rules as to the qualifications and admission of proper persons to be "Advocates of the Court" and subject to such rules to enrol such and so many Advocates as it thought fit. These provisions clearly show that advocates enrolled under Section 41 were enrolled as advocates of a High Court and were entitled, once enrolled, to practise either in the High Court or Courts subordinate to such High Court or both. There was thus in the case of advocates so enrolled no distinction between those who practised in the Courts subordinate to such High Court as they were entitled on enrolment, as aforesaid, to practise either in the High Court or in Court or Courts subordinate thereto or both. The Indian Bar Councils Act, XXXVIII of 1926 also defined an `advocate' meaning one "entered in the roll of advocates of a High Court under the provisions of this Act". Section 8 laid down that no person would be entitled as of right to practice in any High Court maintained under this Act. Under section 8(2) the High Court was required to prepare and maintain "a roll of advocates of the High Court" in which should be entered the names of (a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section came into force in respect thereof; and (b) all other persons who were admitted to be "advocates of the High Court" under this Act. Section 9 empowered the Bar Council to make rules to regulate the admission of persons to be "advocates of the High Court", and Section 10 gave power to the High Court in

the manner therein provided to reprimand, suspend or remove from practice "any advocate of the High Court" whom it found guilty of profession or other misconduct. Section 14(1) of the Act provided that an advocate, i.e. one whose name was entered under this Act in the roll of advocates of a High Court, shall be entitled as of right to practise in the High Court of which he is an advocate or in any other court save as otherwise provided by sub-section (2) or by or under any other law for the time being in force. Once, therefore, the name of an advocate was entered in the roll of advocates of a High Court under one or the other Act, he was entitled to practise in the High Court and in courts subordinate thereto or in any other court subject of course to the provisions aforesaid. He was thus an advocate of the High Court irrespective of whether he practiced in the High Court or in the courts subordinate thereto, and as seen from Section 10 of the Bar Councils Act, he became amenable to the disciplinary jurisdiction of the High Court by reason of his being enrolled as an advocate of the High Court. The expression "an advocate of a High Court" must, therefore, mean, in the light of these provisions, an advocate whose name has been enrolled as an advocate of a High Court, no matter whether he practised in the High Court itself or in courts subordinate to it or both. The expression "an advocate or a pleader of a High Court" having thus acquired the meaning as aforesaid, it must be presumed that a similar expression, namely, "a pleader of a High Court for a period of not less than ten years" was used in the same sense in Section 101(3)(d) of the Government of India Act, 1915, when that section laid down the qualifications for the office of a Judge of a High Court in the case of a pleader. The same phraseology was also repeated in Section 220(3)(d) of the Government of India Act, 1935, except for one change, namely, that in calculating ten years' standing his standing as a pleader of two or more High Courts in succession was also to be included."

The decision reported in AIR 1984 Cal. 7 (supra), deals with the similar type of situation. In paragraph 10, it has been observed as under :

"After the coming into force of the Advocates Act, 1961 there are only two classes of Advocates

viz., Senior Advocates and other Advocates (vide S.16(1) of the said Act). Therefore, separate meanings cannot be attributed to the word "Advocate" under Art.233(2) of the Constitution on the one hand and Art. 124(3)(b) and Art. 217(2)(b) on the other. The Supreme Court has also made this position clear in the case of Prof. Chandra Prakash Agrawal Vs. Chaturbhuj Das, reported in AIR 1970 SC 1061 where it has been observed at p.1064):

"It is true that in this clause the word "advocate" is used without the qualifying words "of a High Court". It is difficult, however, to see how the fact that the word "advocate" only used in connection with the appointment of a District Judge would assist counsel in the construction suggested by him of the expression "advocate of any High Court" in Article 217 or that that expression must mean an advocate who has had the necessary number of years' practice in the High Court itself. The distinction, if any, between the words, "an advocate" in Article 233(2) and the words "an advocate of a High Court" in Article 217 (2)(b) has no significance in any event after the coming into force of the Advocates Act, 1961, as by virtue of Sec. 16 of the Act there are now only two classes of persons entitled to practice, namely, senior advocates and other advocates".

In paragraph 18 it has been observed as under :

"A very important duty is, therefore, cast on the Chief Justice of the High Court who has to ensure that the best available person with good legal acumen and of unimpeachable integrity and without any political or religious bias is recommended by him for appointment. In looking for such a person, the wider the field, the better is the chance for a proper selection. There is yet another reason why it may be necessary to look beyond the boundaries of the High Court in making recommendations from the Bar. A High Court Judge's take home pay varies between 200 to 300 Gms. depending on whether or nor he contributes to the provident fund. Any good lawyer who can be considered to be suitable for elevation to the Bench can earn this amount in less than a week. So the Chief Justice's invitation to join the Bench is often declined and as a result lawyers

> who do not command a good practice have to be recommended. The rate of fees of the Advocates practising in the District Courts is not as high as that of those practising in the High Court and as such more suitable persons may be available from the District Bar to join the Bench."

##. Since the petitioners are practising for more than 10 years in the State and since their names appear on the roll of the Bar Council of Gujarat since more than 10 years, they can definitely be described as "advocates of the High Court". In view of the aforesaid position, the petitioners are qualified under section 10(4) of the Bombay Industrial Relations Act for appointment to the post of Member, Industrial Court, as they are qualified to be appointed as Judge of the High Court. The stand taken by the GPSC is, therefore, not tenable.

##. It is hoped that, in future, appropriate care will be taken by the GPSC as and when the aforesaid question arises for consideration and the question of eligibility of the candidates for such appointment will be considered by the GPSC considering the observations made in this judgment. The petitions are accordingly allowed. The Gujarat Public Service Commission is directed to process the applications of the petitioners on merit and it is held that the petitioners are eligible for appointment to the post of Member, Industrial Court.

##. Rule is accordingly made absolute in each of the petitions with no order as to costs.

(P.B.Majmudar,J)
(pathan)